

¹ Respondent's brief cited claimant's 2008 discovery deposition. Neither party, nor Judge Avery, listed claimant's discovery deposition as part of the record and there was no stipulation indicating it was part of the record. The Board has not considered claimant's discovery deposition, which is not in the record.

The issues for the Board's review are:

(1) Did claimant suffer personal injury by accident arising out of and in the course of his employment? Were his symptoms the result of his accidental injury?

(2) What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Prior to October, 2008, claimant worked as a shop supervisor for respondent for four and one-half years. He ran the shop, ordered parts and maintained equipment.

On Friday, May 16, 2008, a truck arrived at the shop carrying a 12-14 foot long, 600-pound dump truck bed liner. Jimmy Palmer, a co-worker and claimant's nephew, tried to drag the bed liner off the trailer with a forklift. The bed liner got stuck on the trailer's edge. Claimant attempted to free the bed liner by sticking his arm in a hole in the bed liner, picking it up and telling Mr. Palmer to back up. As Mr. Palmer did so, the bed liner fell off the forks. Claimant testified his entire right side was pinned between the bed liner and the trailer. He screamed and tried to get free by jerking his right arm out of the hole, pushing the ground with his right leg and twisting his neck and back. Mr. Palmer backed up the forklift and the bed liner fell off claimant and hit the ground. Claimant testified he had immediate right arm, right leg and entire right side pain that made him collapse.

Claimant estimated he was pinned for 10 seconds and it would have taken that long to put the forklift in reverse. Mr. Palmer estimated claimant was pinned for no more than a second, as the forklift was already in reverse when claimant screamed.

Mr. Palmer could not observe the accident; the bed liner was in the way. He testified claimant limped that day and looked like he had been hit in the groin or had a pulled groin. He saw that claimant's right hand was red and swollen. Mr. Palmer testified claimant signed the bill of lading for the delivery and took it to Becky Beck, respondent's secretary and bookkeeper. Mr. Palmer testified that he witnessed claimant telling Ms. Beck that the bed liner fell on him, pinned his hand, and that he thought he pulled his groin, which prompted Ms. Beck to laugh. Mr. Palmer testified that claimant asked for an accident report, but Ms. Beck indicated she could not find one.

Claimant testified that after the accident, he told Brent Jessee, an owner of respondent, about the incident. Mr. Palmer testified that he witnessed this conversation. Claimant went to clock out for lunch and told the same information to Shelly Downs, respondent's dispatcher, including that he thought he pulled his groin. Claimant testified he asked Ms. Downs for an accident report, but she was unable to locate one. Claimant told her he thought he had one in his tool box.

Mr. Palmer and claimant went to lunch about 10-15 minutes after the accident.² Mr. Palmer testified that claimant told him he was hurting badly. Claimant testified he did not eat due to pain. Mr. Palmer testified that after their return from lunch, claimant told Brent Jessee, Ms. Downs, Ms. Beck, John Bateman and Brent's daughter that he thought he pulled his groin, and the employees laughed and mocked how he was walking.

Brent Jessee saw and spoke with claimant daily, but they generally did not work together. Brent Jessee denied joking with claimant about hurting his groin on the date of accident. He testified he was unaware of an accident until 10 days to two weeks later.

Claimant did not seek or ask for medical treatment on the date of accident. Respondent did not offer medical treatment. Claimant testified he left work early, but his time card showed he clocked out at 6:43 p.m. Mr. Palmer testified claimant did not report to work on Saturday, May 17, 2008, but claimant actually worked nearly eight and one-half hours that day. Claimant worked on May 19 and May 20, 2008. Mr. Palmer did not work two or three days after claimant's accident to attend a funeral.

Claimant testified that he filled out an accident report, but was unable to turn it in because he was admitted to St. John's Hospital (St. John's) for three days, apparently May 21-23, 2008, due to internal bleeding.³ He was treated for peptic ulcer disease and erosive gastritis. His bills were processed under health insurance. Claimant asserted he told hospital personnel he had been hurt at work. He was not treated for his back or neck. He testified that he received medicine for his back and right arm. Claimant got better with rest.

Claimant took 40 hours of vacation the week of May 17 through May 23, 2008. Mr. Palmer testified respondent forced claimant to take vacation. Ms. Beck testified claimant asked to take vacation that week. Mr. Palmer testified that respondent's representatives knew claimant was hospitalized and were worried he was going to file a workers compensation claim. Richard "Rick" Jessee (another of respondent's owners), Brent Jessee and Ms. Beck testified to not knowing claimant had been hospitalized.

Brent Jessee testified that about 10 days to two weeks after the accident, he saw a bed liner on the ground in front of the shop and asked why it was there. Either claimant or Jimmy Palmer told him that claimant's arm, but no other body parts, had been pinned by the bed liner. Brent Jessee testified that he asked claimant if he was hurt and claimant responded no. After this discussion, Brent Jessee told Rick Jessee, about the incident. Rick Jessee asked Brent Jessee if claimant had been hurt and Brent Jessee said no.

² Claimant clocked out at 12:07 p.m. and clocked in at 1:02 p.m. Beck Depo., Ex. 2 at 1. A delivery receipt possibly signed by claimant shows that an object weighing 525 pounds (600 pounds when including cover strips and hardware) was delivered with a "time in" at 1:30 p.m. and "time out" at 1:41 p.m. *Id.* at 28.

³ R.H. Trans. at 16. There are no records in evidence from St. John's.

Claimant returned to work on May 27, 2008. Mr. Palmer testified that claimant dragged his right leg around after the accident and was unable to lift much. The only body part Mr. Palmer recalled claimant complaining about was his right leg.

Mr. Palmer worked for respondent until June 2, 2008. Mr. Palmer may have worked with claimant one or two days after the accident because Mr. Palmer was working in the fields. Mr. Palmer testified claimant was upset that he quit working for respondent and, as a result, they did not speak or see each other for about one month after Mr. Palmer quit. Mr. Palmer testified claimant's right leg did not get real bad until after Mr. Palmer quit.

According to Brent Jessee, about three to four weeks after the accident, claimant said his legs and back were hurting, but did not say why or that he hurt due to the accident.⁴ At that time, Brent Jessee did not observe claimant having any problems, such as issues with balance, coordination or limping. Claimant did not ask for light duty and did not say he was unable to work. Brent Jessee did not ask claimant if he had been hurt on the job, if he needed to see a doctor or if he needed to fill out an accident report. He testified claimant never told him he injured his back, neck, legs or anything else in the May 16, 2008 accident. Brent Jessee testified claimant never complained about neck pain or arm or leg numbness. At some unknown point in time, Brent Jessee saw claimant limping. He testified he did not know whether he saw claimant limping before or after May 16, 2008.

Claimant continued to work. He testified that he complained to Ms. Downs and Ms. Beck that he was still hurting and, at some point, asked to see a doctor. Claimant testified he turned in an accident report and that Ms. Downs suggested he go to a chiropractor.⁵

Claimant went to Russell McDaniel, D.C., on July 8, 2008. Claimant had not had any treatment after being hospitalized in May, 2008. Claimant completed and signed a patient information sheet showing he was referred by "Mike Lake."⁶ Claimant complained about chronic low back pain. Claimant testified he told Dr. McDaniel about his accident. Dr. McDaniel noted claimant had low back pain of unknown onset, possibly work related. Dr. McDaniel diagnosed claimant with a lumbar sacroiliac subluxation.

Claimant testified that he told Ms. Beck, at some unknown time, that he quit going to the chiropractor and was going to treat with a medical doctor. Claimant testified Ms. Beck told him to use his health insurance because respondent "don't do work comp."⁷

⁴ Brent Jessee testified claimant complained about his neck *and did not* complain about his neck. Brent Jessee depo., pp. 7, 11. His written statement noted claimant had back and leg complaints. *Id.*, Ex. 1.

⁵ R.H. Trans. at 19, 21, 25.

⁶ McDaniel Depo., Ex. 1 at 3.

⁷ R.H. Trans. at 24.

Claimant was next seen by Dr. Bryan Barnes on August 26, 2008. This report was the first medical documentation of a May 16, 2008 work injury, cervical complaints and upper extremity complaints.⁸ Dr. Barnes ordered a nerve conduction study and MRI. Dr. Barnes then referred claimant to Margaret Ellen Nichols, M.D., a board certified neurosurgeon, for thoracic and lumbar stenosis, leg pain and arm numbness.

Dr. Nichols examined claimant on September 25, 2008. Claimant told Dr. Nichols he had immediate right leg numbness due to the May 2008 accident.⁹ Her physical examination demonstrated bilateral arm and right leg weakness and pain and back pain.¹⁰ Genitourinary examination was normal. Claimant was negative for bladder or bowel incontinence. Dr. Nichols diagnosed claimant with cervical and thoracic disk herniations. She noted claimant needed emergency surgical decompression of the spinal cord.

In the 16.57 weeks prior to seeing Dr. Nichols, claimant averaged 40.75 hours of work per week for respondent, including 10 weeks in which he worked overtime.¹¹ Claimant testified that he needed help to do physical work during this time and would go home when he was not able to work due to neck and back pain. Claimant testified Brent Jessee knew he needed help and hired him an assistant named Frank Mosier.

Claimant prepared and signed an October 1, 2008 handwritten statement indicating the bed liner pinned his right side against a trailer, he thought he pulled his groin, his hands went numb and had been that way ever since.¹²

Ms. Beck completed an "Employer's Report of Accident" on October 6, 2008, noting claimant reported a May 16, 2008 injury to respondent on October 1, 2008. Ms. Beck testified she knew about the bed liner incident, but claimant never told her until October 1, 2008, that he had been hurt due to such incident. She testified she never knew claimant was having neck, back, spine, arm or leg problems until October 2008. She testified claimant complained about difficulty walking for about a week before October 3, 2008, when he left work due to doctor's orders. She testified claimant worked his full-time job until October 2008 and never requested light duty. She never observed claimant having difficulties walking between May 16 and October, 2008. However, she testified that she would only see claimant if he came into her office; she did not observe claimant while he worked.

⁸ Stein depo. at 15-16; Prostic depo. at 30-31. Dr. Barnes' records are not in evidence.

⁹ Nichols depo. at 6; see also Beck Depo., Ex. 2 at 153, 163.

¹⁰ Beck Depo., Ex. 2 at 154, 164. A number of Dr. Nichols' records are in Beck Ex. 2.

¹¹ *Id.*, Ex. 1. This time frame is June 1 through Sept. 24, 2008.

¹² *Id.*, Ex. 2 at 33, 143.

Rick Jessee testified that prior to October 2008, claimant worked his normal job and did not ask for light duty. Between May 16 through October, 2008, Rick Jessee observed claimant having problems with his back and legs, and possibly his neck and arm, but he could not say when he made such observations. Rick Jessee observed claimant limping on some days, but not other days. He did not indicate when such observations were made. Rick Jessee testified he first became aware of claimant having a problem with his back in October 2008, when he noticed claimant limping. He told claimant that he should see a doctor. Rick Jessee assumed claimant would seek treatment under health insurance. Rick Jessee testified he first became aware that claimant was pinned by the bed liner in October 2008.

Dr. Nichols performed a C5-6 anterior cervical decompression and fusion on October 27, 2008. Dr. Nichols' November 4, 2008 report stated:

Because the patient had no pain or neurologic complaints prior to the injury, I believe that the injury exacerbated preexisting cervical, thoracic, and lumbar stenosis, and that his spinal cord disfunction is directly related to the injuries at those levels.¹³

Dr. Nichols performed a T11 to L4 and partial L5 decompressive laminectomy on November 12, 2008. Claimant did not have much improvement following his surgeries because the spinal cord compression had likely already caused permanent damage.

Claimant tried to return to work in early-2009. He testified respondent had him perform unaccommodated work and, as a result, he was unable to walk. Dr. Nichols took claimant off work on March 30, 2009. Ms. Beck testified claimant turned in his work uniforms in April 2009, and said he would not return to work. Prior to such time, respondent paid for claimant's health insurance under the belief he would return to work.

Dr. Nichols, in a November 9, 2009 letter, recommended that claimant undergo a right ulnar nerve decompression.¹⁴

On November 30, 2009, Paul Stein, M.D., a board certified neurosurgeon, evaluated claimant at respondent's request. Claimant told Dr. Stein that his accident resulted in immediate right arm and leg numbness that progressively worsened. Claimant complained of: (1) middle and lower back pain; (2) numbness and tingling in both hands and from the waist to the knee in the left leg, and throughout the right leg; (3) urine and bowel control difficulty; and (4) weakness requiring use of a four-point cane.

¹³ Nichols Depo., Cl. Ex. 2.

¹⁴ *Id.*, Cl. Ex. 7; Beck Depo., Ex. 2 at 35.

Dr. Stein's November 30, 2009 report stated:

There is a question regarding causation and the relationship of the pathology to a work incident which apparently occurred on 5/16/08. Questions arise because Mr. Lake reports in the immediate onset of numbness in the right lower extremity and pain after the incident at work. However, when he presented to St. John's Regional Medical Center on 5/21/08 with substantial GI complaints, there was no history given or noted regarding spinal complaints such as neck or back pain or numbness in the extremities. He presented to the chiropractor on 7/8/08 with complaints of low back pain which was characterized by the chiropractor as "chronic" and for which the patient reported an unknown onset. There was no report of the injury which apparently occurred on 5/16/08. It was not until 8/26/08, at the office of his primary care physician, that Mr. Lake reported the work incident and related it to a variety of spinal origin symptoms. I have no mechanism based purely on medical information from which to determine whether the symptomatology was causally related to the work incident.¹⁵

Dr. Stein noted claimant had preexisting spinal stenosis. Dr. Stein indicated claimant had cervical myelopathy and likely had lower thoracic myelopathy. Dr. Stein opined claimant's type of symptomatology frequently develops absent trauma. He could not link the work incident and the symptomatology because there was no documentation claimant had his symptoms shortly after the accident.¹⁶

Based on the AMA *Guides*¹⁷ (hereinafter *Guides*), Dr. Stein rated claimant as having a 40% permanent partial whole body impairment using DRE Cervicothoracic Category VI, and a 25% permanent partial whole body impairment for the cervical fusion, which resulted in a combined 55% whole person impairment. Dr. Stein provided sedentary restrictions and noted claimant was likely unable to perform full-time, gainful employment.

On June 28, 2010, Judge Avery ordered an independent medical evaluation with Lynn Ketchum, M.D., a board certified plastic and hand surgeon. Dr. Ketchum evaluated claimant on August 12, 2010. Claimant told Dr. Ketchum his right elbow was pinned between the bed liner and the trailer on May 16, 2008, and he had immediate numbness in the ulnar three digits of his right hand when he tried to extricate himself. Dr. Ketchum diagnosed claimant with severe right cubital tunnel syndrome due to his elbow being pinned in the accident. He performed a right cubital tunnel release on October 20, 2010. Thereafter, Dr. Ketchum recommended therapy and continued to monitor claimant. On February 17, 2011, Dr. Ketchum ordered a Functional Capacity Evaluation (FCE).

¹⁵ Stein Depo., Ex. 2 at 7.

¹⁶ *Id.* Dr. Stein provided similar opinions in February 18, 2010, and October 6, 2011 reports.

¹⁷ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

On March 3, 2011, Dr. Laurie Behm, M.D., who is board certified in physical medicine and rehabilitation, evaluated claimant at respondent's request. Dr. Behm recorded that claimant had immediate right posterior and mid-lower leg numbness. She also noted that claimant developed bilateral arm numbness. Dr. Behm noted claimant had bowel and bladder incontinence. Dr. Behm rated claimant as having a 60% whole body impairment.

Shawn Leggett, P.T., conducted an FCE on March 16, 2011. Leggett concluded claimant could lift 12 to 17 pounds below waist level, 17 pounds above the waist to shoulder level, and seven pounds above shoulder level, all occasionally.

Dr. Ketchum's March 17, 2011 report indicated claimant had a 25% permanent partial impairment to the right upper extremity based upon the *Guides*. Dr. Ketchum agreed with the FCE restrictions for claimant's right upper extremity.

Two vocational consultants interviewed claimant by phone and prepared lists of tasks claimant performed in the 15 years prior to his accident. Jerry Hardin interviewed claimant on June 15, 2011. Mr. Hardin opined claimant was essentially and realistically unemployable. Karen Terrill interviewed claimant on August 1, 2011. She opined that claimant was capable of earning \$383.20 per week as a hand moulder or \$448 per week as a touchup screen or printed circuit board assembler.

Edward J. Prostin, M.D., evaluated claimant at his attorney's request on October 28, 2011. Dr. Prostin noted claimant immediately knew he was injured after being crushed by the bed liner, but did not seek immediate medical attention. Using the *Guides*, Dr. Prostin rated claimant as having a combined 73% permanent partial impairment to the body as a whole based on a 60% rating for DRE Cervicothoracic Category VII (cauda equina syndrome with bowel or bladder compromise), a 20% rating for multi-level thoracic and lumbar decompressive surgeries, and a 25% permanent partial impairment to the right upper extremity. For claimant to be employable, Dr. Prostin noted he would most likely need a motorized wheelchair and sedentary duties.

Claimant testified at the February 6, 2012 regular hearing that his right leg does not work and he has no feeling from the waist down in his right leg. He has no feeling in his left leg, but it functions. He has leg braces, uses a cane and wears a lumbar corset at home. He has pain from his neck to his low back. His right little finger does not bend or move. Claimant is on social security disability. He has not looked for work.

Dr. Stein testified on April 12, 2012. Dr. Stein testified that claimant had short pedicles and degenerative changes in his spine which predisposed him to spinal stenosis. Dr. Stein also noted claimant had disk protrusions at C5-6 and T11-12. Dr. Stein testified claimant's type of symptoms occur frequently, even absent trauma. Dr. Stein could not say claimant's disk herniation was due to the accident.

Regarding causation, Dr. Stein testified as follows:

- A. Well, the causation of the damage to the spinal cord, the primary problem is the damage to the spinal cord, the causation is a combination of the congenitally narrow spinal canal in several areas, which predisposed to spinal cord compression, combined with degenerative disease with bone spurs, calcium deposits and disc protrusion, which caused pressure on the spinal cord. Now, the relationship to the injury of 5-16-08 depends on your orientation, and let me explain that. Mr. Lake states that he immediately had pain and numbness in his arm and in his leg and that he reported this to his employer and that he had trouble working immediately and it just became progressively worse. If I had found documentation of that, then I might have felt that there was a causal relationship between the accident and the symptomatology. This kind of symptomatology occurs frequently in people with his congenital abnormalities, even absent trauma, and I could find nothing in the records early on to document Mr. Lake's statements that his symptoms came on immediately and progressed from there and that this was all reported. On page seven of my report, in the first large paragraph, I explain my thinking and my thought processes in determining that I could not based on the medical information available make a determination that his symptomatology was causally related to the work accident.
- Q. If we were to assume that the work event – strike that, let me try to rephrase this question. If the work event was the cause of his complaints, when is the outside window or the latest date when you would expect to have these symptoms of tingling and numbness and the other reported symptoms?
- A. Well, as I said, Mr. Lake stated they started immediately. If there is a causal relationship, you would certainly expect some of these symptoms to start reasonably soon after the incident, not necessarily immediate, but certainly within a couple of days, at the outside a week or two.¹⁸

Dr. Stein noted that the St. John's records contained no mention of claimant having cervical, upper extremity, lumbar or lower extremity complaints, just that he almost fainted and had black, tarry stool related to gastrointestinal bleeding. If claimant had immediate right arm and leg numbness after his accident, Dr. Stein would have expected the St. John's records to mention myelopathic symptoms (symptoms indicative of spinal cord damage, such as numbness, tingling, weakness or coordination problems). Dr. Stein testified Dr. McDaniel's July 2008 records concerned back pain without leg complaints. If claimant was having myelopathic symptoms, Dr. Stein testified such complaints should have been in the chiropractic records. Dr. Stein repeatedly testified he did not have documentation linking claimant's complaints with his alleged work accident. He noted the first medical documentation of the May 16, 2008 work injury, cervical complaints and upper extremity complaints in Dr. Barnes' August 26, 2008 report.

¹⁸ Stein Depo. at 12-13; see also pp. 21-22.

Dr. Stein testified claimant's permanent functional impairment and restrictions were not related to the asserted work injury.

On cross examination, Dr. Stein stated the following regarding causation:

Q. All right. So if you believe Glenn, that it happened immediately and he didn't – he didn't go to a doctor about it until July, then his symptomatology would be consistent with being injured when the bed liner crushed him?

A. The symptomatology could have been related under those circumstances, yes.¹⁹

. . .

Q. All right. And as he described the accident, that type of accident could cause the injuries that he had, is that correct?

A. It could cause the pre-existing pathology to become symptomatic.

Q. Okay. And so what Glenn says is that he had the symptomatology and it continued to get worse and he didn't see a doctor about it for two months even though it was there. So if that is true, if you take that as true, then the injury that he sustained or that accident that happened with the bed liner and then the injuries he's complaining of would be consistent with how he has described it?

A. It could be, yes.²⁰

Dr. Prostin testified on April 20, 2012 that claimant's accident caused him to have "sprains and strains of his spine perhaps with herniation of disc superimposed upon preexisting spinal stenosis and degenerative disc disease with development of spinal cord contusions."²¹ Dr. Prostin testified claimant's cervical and thoracic disk herniations and spinal cord edema were caused, contributed to or worsened by his accidental injury. He agreed with Dr. Stein that the sort of symptoms exhibited by claimant frequently occur without trauma, but incontinence would be unlikely absent trauma.²² Dr. Prostin testified claimant was incapable of substantial and gainful employment.

¹⁹ *Id.* at 24.

²⁰ *Id.* at 26.

²¹ Prostin Depo. at 6.

²² *Id.* at 23.

When questioned regarding causation of claimant's symptoms, Dr. Prostic testified:

Q. Now, there has been some testimony in the case that Mr. Lake experienced immediate symptoms in his groin and leg and hip but he didn't seek medical treatment for two months when he first went to a chiropractor. Does this in your medical opinion cause you any concern as to whether the injuries he sustained were a result of the bedliner crushing him?

A. Well, the symptoms going to the groin and hip are more likely from the disc rupture at the lower thoracic spine than from the cervical spine lesion, but very commonly people with symptoms of cervical or lumbar spinal stenosis have it increase gradually rather than all of a sudden.²³

...

Q. And, in fact, it is usual in the scenario like this for your symptoms to continue to get worse with time?

A. It is common.²⁴

Dr. Prostic also testified:

Q. If we were to assume that the work event was the cause of his need for surgery and current disability, what is the outside window of when you would have anticipated that he would have had symptoms in relation to the work event?

A. If he doesn't recognize symptoms within several weeks, then it's hard for me to make the connection.

Q. And when we say symptoms, what kind of symptoms would be expected within several weeks of that?

A. Well, for his cervical lesion the most common would be numbness and tingling of his arms. For his lower lesion that's much more common to cause the pain going into the leg and bowel, bladder, and sexual dysfunction.

Q. If I understood correctly, if the work event was the cause of this, of his problems, he would have had those symptoms within several weeks or so after the work event?

²³ *Id.* at 13.

²⁴ *Id.* at 39.

- A. Well, he should be recognizing some symptoms. They can gradually get worse and you can pick up progressively more symptoms as time goes on. But if he truly has no symptoms for several weeks, then it's hard to say that it's the work event rather than being unrelated to the work.
- Q. So if this work event was May 16th of '08 you would expect symptoms by early June of '08?
- A. Yes.²⁵
...
- Q. If he did not recognize symptoms by early June 2008, would it be your opinion that the work event was not the cause of his current complaints and symptoms?
- A. I would have a difficult time saying with reasonable medical certainty that the work event was the cause of the eventual problem.²⁶

Dr. Prostin admitted the St. John's records did not reflect neck, upper extremity, back or lower extremity problems, Dr. McDaniel's records did not mention neck or upper extremity complaints, and neither mentioned the accident. He testified claimant should have had neck and upper extremity problems when he saw Dr. McDaniel in July 2008 if the accident caused claimant's symptoms. Dr. Prostin agreed Dr. Barnes' August 2008 report was the first mention of the accident, neck, upper extremity or myelopathic complaints.

On redirect, Dr. Prostin testified regarding causation as follows:

- Q. And then he has by his own testimony a 600-pound bedliner crush him against a truck and then he is jerked and twists at the same time to get out of it. He twists his neck, back, and arm and since that time began having problems and within a few months needed an operation on his neck and back. Wouldn't it be more likely in your opinion, Doctor, that this came from the trauma versus just appeared out of nowhere?
- A. Yes.
- Q. I mean at the very least, he had some congenital conditions and he may have had some degenerative changes in his back, but this incident in your opinion didn't it aggravate those conditions to the point of becoming symptomatic and the need for treatment?
- A. Yes.

²⁵ *Id.* at 25-26.

²⁶ *Id.* at 38-39.

. . .

Q. And he reported to you, and you wrote it in your report, that he recognized injury but did not seek medical attention at that time and is that what he told you?

A. Yes.

Q. And have you seen anywhere that said he didn't have those symptoms even though he didn't go to a doctor right away?

A. No.

Q. And just because he didn't go to the doctor right away, that doesn't mean he wasn't having the symptoms, does it?

A. Correct.²⁷

Dr. Ketchum testified the cause of claimant's right cubital syndrome was the May 16, 2008 accident. Dr. Ketchum offered no opinion regarding the cause of claimant's neck and lower back injuries. Dr. Ketchum testified that it was his understanding that claimant's right elbow problems occurred immediately as a result of the accident. He agreed the first mention of claimant having right upper extremity complaints was in Dr. Barnes' August 2008 report and the St. John's and chiropractic records made no such mention of right arm problems. Dr. Ketchum stated claimant's right elbow problems could have worsened over time if claimant had a contusion that caused bleeding, which in turn would cause scar tissue. However, Dr. Ketchum agreed his operative report contained no mention that scarring was ever identified.

Drs. Behm and Nichols testified on May 18, 2012. Dr. Behm testified that claimant should follow sedentary restrictions. She did not think claimant could return to work as a mechanic. Dr. Behm indicated claimant could not perform 39 of 44 unduplicated tasks identified by Mr. Hardin. Dr. Behm testified the May 16, 2008 accident caused claimant's neurological deficits and cervical and thoracic spinal cord injuries. She testified that claimant's spinal cord swelling was likely due to trauma.

Dr. Behm could not remember ever having had any records from St. John's, Dr. McDaniel or Dr. Stein. Her chart was destroyed in the Joplin tornado. Her understanding of claimant's injury was relayed to her from claimant. Dr. Behm did not know when claimant developed his arm numbness. She agreed that if her rating report did not reference claimant having sexual dysfunction, it was likely he did not have such problem when the rating was prepared.

²⁷ *Id.* at 34-36.

Regarding causation, Dr. Behm testified:

Q. Let's assume that the May 16, 2008 event was the cause of these things, and assuming that to be the case, what's the outside window, so to speak, of when we would expect him to have symptoms?

A. It can vary.

Q. What's the –

A. I've seen people get in a car wreck and come to me six months later with these symptoms. I've seen people come two days. So the window is, you know, when do we start losing function and when do we start noticing we lose function. So it's when does the patient realize that the symptom is a problem. So, you know, it can vary.

Q. Is there an outside window of when you would expect Mr. Lake to have noticed symptoms?

A. No.

Q. And what I'm getting at is I assume there is some point in time where if it's past a certain point after the trauma or motor vehicle accident, or whatever the case may be, where you would say, well, this can't be related any longer?

A. I think he was in that window. So, you know, was a three or four month window appropriate for him. Yes, that can happen. A five, six year, maybe not.

Q. When we say the window, are you saying it would be that he would be asymptomatic during that three to four months?

A. He can be. Or maybe he just thinks this is not a problem. Maybe the numbness is not a problem. Sometimes the only symptom they have is they're just a little off balance. So it's just very difficult to pin down.²⁸

Dr. Nichols testified that claimant told her his right leg pain and numbness, lumbar pain and bilateral arm numbness all started immediately or shortly after the May 2008 accident. Dr. Nichols testified the injury very likely exacerbated claimant's preexisting congenital stenosis, disk degeneration, spinal cord compression, herniated disk at C5-6 and his disk protrusion at T11-12. She testified claimant's type of accident was consistent with disk injuries and compression of the spinal cord.

²⁸ Behm Depo. at 30-32.

Dr. Nichols confirmed the symptoms claimant described can come on without any trauma, just from wear and tear over time. Dr. Nichols further testified:

- Q. If we assume that the work event on May 16, 2008 happened as Mr. Lake says and was the cause of his problems, what is the outside window of when you would expect him to have symptoms?
- A. If the work event caused the cord compression, when would I have expected him to have symptoms?
- Q. Correct.
- A. Fairly immediately.
- Q. Within a week or two? Can you quantify that at all?
- A. I'd say at least a week.
- Q. And I assume when you're determining causation on this case you're assuming that he did have symptoms within a week of the accident?
- A. Yes.
- Q. And if the history was otherwise and he told you that his symptoms did not develop until quite a bit after that week period, would your opinion regarding causation be different?
- A. Yes.
- Q. In that situation, you would feel the work event was not the cause?
- A. Correct.
- Q. Assuming the – Well, let me ask you this. In that week period we talked about, what type of symptoms would you expect him to have during that period, assuming that it was related to the work event?
- A. I would have expected the same symptoms that he presented with; leg weakness, leg numbness, arm weakness and numbness, difficulty walking.
- Q. If the work injury was the cause of that, of these complaints, would you expect his condition to continue getting worse in time after the work event, or would it stay more or less the same?
- A. It could either get worse or stay the same.²⁹

²⁹ Nichols Depo. at 25-26.

Dr. Nichols did not have records from St. John's or Dr. McDaniel. Dr. Nichols would have expected claimant to have neck, back, leg or upper extremity complaints by the time he was released from St. John's and she would have expected him to have neurological complaints, which she defined as numbness or weakness in the arms and legs or spasticity, when he saw Dr. McDaniel in July 2008. She testified, "If he had no neurologic complaints in July, then I would think it was unlikely that his neurologic problems later were related to the work injury."³⁰

On redirect, Dr. Nichols testified:

Q. Now, Dr. Behm testified that someone in Glenn Lake's position could have symptoms that are subtle at first and then get worse. Do you agree with that?

A. Yes.

Q. Does the fact that Mr. Lake waited to go to a chiropractor until July change your opinions any with regard to causation?

A. No.

Q. I mean, some people who have symptoms just choose not to go to a doctor immediately; correct?

A. Correct.

...

Q. Would you feel any differently if Mr. Lake said that from May until he saw you his condition continued to progress and get worse? Would you see anything weird about that or not right?

A. I think that is still consistent with the injuries exacerbating the pre-existing condition.³¹

Dr. Nichols continues to provide claimant prescription management. Dr. Nichols opined claimant cannot return to his job as a mechanic.

Dr. McDaniel testified on July 31, 2012. He voiced familiarity with lumbar radiculopathy, spinal myelopathy, stenosis and spinal cord edema. Dr. McDaniel denied that claimant provided him with a history of a May 16, 2008 work injury or any accident involving a bed liner.

³⁰ *Id.* at 29.

³¹ *Id.* at 32-34.

Dr. McDaniel examined claimant's lumbar area, but did not test the cervical area because claimant did not make complaints in that area. Dr. McDaniel indicated he would have recorded any other complaints, had claimant made any apart from his upper buttocks and lower back. He tested claimant's lumbar range of motion and cervical range of motion because sometimes decreased lumbar range of motion will reflect in the neck. There were no significant abnormalities on the range of motion testing. Dr. McDaniel testified: "The only findings that showed a positive were Kemp's on the right and left side which would tell me there was some kind of facet involvement in the lower back. Other than that, everything that I took was negative."³²

Dr. McDaniel confirmed that his exam was consistent with claimant's complaints of centralized low back and upper buttock area pain. Claimant had pain radiating into his buttock, but no radiculopathy and no thigh pain or leg pain, just a lumbar sprain or strain. Dr. McDaniel testified claimant never complained of neck or cervical spine problems, weakness, numbness or tingling of the upper extremities, lower extremity symptoms, bowel or bladder dysfunction, sexual dysfunction, difficulty walking or symptoms suggestive of neurological problems, spinal cord edema, myelopathy, a herniated disk or radiculopathy.

Judge Avery's Award indicated it was his understanding that respondent argued claimant was not injured in May 2008 because he did not have surgery until October 27 and November 12, 2008. Judge Avery ruled claimant was injured as alleged and suffered the ill effects of his injury at the time of the accident. He concluded claimant's delay in getting treatment was based on the respondent inadequately responding after having notice of the accidental injury. The Award stated claimant eventually had emergency surgery to relieve the swelling and pressure around his spine. Judge Avery adopted Dr. Prostin's 73% whole body impairment rating and found claimant to be permanently and totally disabled. Judge Avery ruled that a man of claimant's age could not have suffered his injuries without trauma.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.³³

K.S.A. 2007 Supp. 44-508(e) states, in part:

"Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.

³² McDaniel Depo. at 11.

³³ K.S.A. 2007 Supp. 44-501(a).

K.S.A. 2007 Supp. 44-508(d) states in part:

"Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

The phrases arising "out of" and "in the course of" employment have separate and distinct meanings. Each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.³⁴

K.S.A. 2007 Supp. 44-501(c) states in part that an employee "shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability." The test is not whether the injury causes the condition, but whether an injury aggravates the condition.³⁵ Even if there is an aggravation of a preexisting condition, a claimant must prove "a relationship between the aggravation and accidental injury arising out of the employment. Causation remains an essential."³⁶

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

³⁴ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

³⁵ *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 589, 257 P.3d 255 (2011).

³⁶ *Boeckmann v. Goodyear Tire and Rubber Co.*, 210 Kan. 733, 738, 504 P.2d 625 (1972).

The existence, nature and extent of a claimant's disability is a fact question.³⁷ A claimant's testimony is sufficient to prove his or her physical condition.³⁸ Medical evidence is not essential to establish the existence, nature and extent of a claimant's disability.³⁹

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

ANALYSIS

The Board concludes claimant had an accidental injury arising out of and in the course of his employment on May 16, 2008, when he was momentarily pinned between the bed liner and trailer, as based on the testimony of claimant and that of his nephew, Mr. Palmer. Claimant sustained what he believed to be a pulled groin.

Shortly after this incident, claimant was admitted to St. John's for peptic ulcer disease and erosive gastritis. There is no credible evidence that claimant's May 21-23, 2008 hospitalization was the result of his accidental injury. The Board does not find credible claimant's allegation that he told St. John's personnel about his work injury. While the St. John's records are not in evidence, both Drs. Stein and Prostic acknowledged such records made no reference to the May 16, 2008 accident, any work accident, or complaints involving claimant's neck, back, upper extremities or lower extremities.

Claimant testified he told Dr. McDaniel about his accident. Dr. McDaniel's July 8 and 15, 2008 records made no reference to the May 16, 2008 accidental injury. Claimant reported low back pain of unknown onset, possibly work related. Such records do not mention neck, upper extremity or lower extremity complaints, including complaints that would be expected from spinal injuries.

Drs. Stein and Prostic testified that Dr. Barnes' August 26, 2008 report contains the first reference in claimant's medical records to the May 16, 2008 accident, neck pain and arm symptoms.

³⁷ *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

³⁸ *Graff v. Trans World Airlines*, 267 Kan. 854, 863-64, 983 P.2d 258 (1999).

³⁹ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 784, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

Claimant's October 1, 2008 handwritten statement indicates his hands went numb when the accident occurred. Claimant told several medical experts that his symptoms were immediate or immediate and worsened thereafter:

- claimant told Dr. Behm that he had immediate right leg numbness;
- claimant told Dr. Nichols that he had immediate numbness in his right leg and both arms;
- claimant told Dr. Ketchum that he had immediate numbness of the three ulnar digits of his right hand;
- claimant told Dr. Stein that he had immediate right arm and leg numbness; and
- claimant told Dr. Prostic that he immediately knew he was injured.

Still, there is no mention of the accident or claimant's asserted immediate symptoms in the St. John's records or in Dr. McDaniel's records. If claimant's symptoms had been immediate, the Appeals Board would have expected him to complain of back symptoms sooner than July 8, 2008, and mention the May 16, 2008 accident, neck and upper extremity complaints sooner than August 26, 2008, as observed by Drs. Stein, Prostic and Nichols. Even when claimant reported low back pain to Dr. McDaniel, there was no mention of the May 16, 2008 event or neck, arm or leg symptoms.

The symptoms claimant reported having immediately or shortly after his accident would seem to be the sort of symptoms that would compel him to seek medical treatment immediately. It is difficult to grasp why he would have not voiced complaints of arm and leg numbness and tingling to medical professionals until August 2008. Instead, claimant worked his regular full-time job. Claimant had health insurance this entire time.

Drs. Stein, Prostic and Nichols – all spine specialists – testified they would have expected claimant to exhibit his arm and leg symptoms fairly immediately, within a couple days, a week or two weeks, several weeks, or at least by early-June, 2008. Dr. Nichols testified that if claimant's neurological complaints were not present in July, 2008, his later complaints would be unlikely to be related to his work injury. Only Dr. Behm, who is not a spine specialist, indicated there was no window for onset of symptoms, indicating she might have doubt if his symptoms did not arise until five or six years post-accident. Dr. Behm essentially equated the onset of symptoms as proving they are related to the accident. Such *post hoc, ergo propter hoc* reasoning has been rejected: just because symptoms follow an accidental injury does not mean the symptoms are due to the injury.⁴⁰

⁴⁰ See *Christenson v. Russell Stover Candies*, 46 Kan. App. 2d 453, 263 P.3d 821 (2011), rev. denied June 13, 2012.

Drs. Stein, Prostic and Nichols agreed claimant's symptoms could come about without trauma. Dr. Prostic indicated incontinence would likely only develop with trauma. However, claimant did not testify to suffering from incontinence. Dr. Nichols' September 95, 2008 report noted the absence of bowel or bladder problems. None of Dr. Nichols' treatment records,⁴¹ both before and after claimant's spinal surgeries, commented on the presence of bowel or bladder incontinence.

The first reference to bowel or bladder problems is contained in Dr. Stein's November 30, 2009 report. Dr. Stein noted what while claimant voiced complaints about incontinence, he never sought medical attention for such condition. The Board finds it unlikely that someone with incontinence would opt to not get treatment for such condition.

Drs. Prostic and Behm recorded that claimant had bowel and bladder incontinence in independent medical examination reports written in 2011. Dr. Behm did not record a history of ongoing bowel and bladder problems from 2008 forward, only that claimant reported such problems when she saw him in March 2011. Dr. Prostic seemingly was of the understanding that claimant developed incontinence due to traumatic injury. If that assumption were true, the Board would expect the evidence to contain treatment records confirming the presence of such symptoms. However, there are no treatment records confirming that claimant had incontinence or that such incontinence was due to the accident. Claimant failed to prove that his asserted incontinence is related to his accident or is a result of his spine surgeries.

While it is possible claimant's accidental injury could have caused swelling to develop slowly within claimant's spine, causing pressure on the spinal cord and resulting in claimant's arm and leg symptoms, there is no credible medical evidence to support such theory. The majority of the medical experts testified claimant's arm and leg symptoms should have been identifiable within a finite period of time, within a few days or by early-June 2008, not by late-August, 2008. No doctor provided a credible reason why claimant would have had delayed onset of symptoms if the accident caused his injuries and need for emergency surgeries in late-September and mid-October 2008.

The Board finds claimant's work accident did not cause his disk herniations and myelopathic or neurological symptoms. Similarly, given the absence of right upper extremity complaints in the medical records until August 26, 2008, claimant's right arm injury is similarly not related to the May 16, 2008 event.

Claimant asserts he complained about his ongoing symptoms to Ms. Downs and Ms. Beck, and that Ms. Downs referred him to a chiropractor. Such allegation is not credible, when claimant listed in a patient information sheet that he was referred by "Mike Lake." The evidence establishes that the first time respondent knew claimant was needing medical treatment was in late-September or early-October, 2008.

⁴¹ As noted in footnote 10, a number of Dr. Nichols' records are contained in Beck Ex. 2.

Even if the Board were to assume as true claimant's allegations that respondent was aware of his injury and refused to provide medical treatment, it is troubling that claimant actually obtained medical treatment at St. John's in May 2008 and with Dr. McDaniel in July 2008, both on his own accord, without making mention of his accident or his diffuse symptoms. The Board finds that if claimant suffered a traumatic injury severe enough to cause his need for three surgeries, his diffuse complaints would have existed when he went to St. John's and when seen by Dr. McDaniel. The Board cannot conclude claimant simply suffered with his various neck, arm, back and leg symptoms until finally seeing his primary care physician, Dr. Barnes, on August 26, 2008. The Board finds that claimant failed in his burden of proving such symptoms were due to his May 16, 2008 accident, primarily based on the medical testimony that such symptoms should have been present by at least early-June 2008.

Claimant is permanently and totally disabled, but the Board does not find claimant proved any temporary or permanent disability or impairment as a result of the accident.

CONCLUSIONS

The Board finds Judge Avery's Award should be reversed. Claimant suffered a groin strain at work on May 16, 2008. Claimant did not meet his burden of proving any other personal injury arising out of or in the course of his employment.

AWARD

WHEREFORE, the Appeals Board reverses Administrative Law Judge Brad E. Avery's August 29, 2012 Award.

IT IS SO ORDERED.

Dated this _____ day of February, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Honorable Brad E. Avery, Administrative Law Judge